Supreme Court, U.S.
FILED

(1)

95 384 SEP 11 1995

No. ———

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RONNIE D. BOYETT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

MARGE A. OVERLY
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
Appellate Defense Division
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332-5113

September 1995

13 pp

QUESTIONS PRESENTED

I. Whether by affirming the decision of the Air Force Court of Military Review, the Court of Appeals for the Armed Forces has sanctioned the retroactive application of the lower court's expansion of what conduct is criminally prosecutable under Article 133 of the Uniform Code of Military Justice, in direct conflict with the edict of this Honorable Court in *Marks v. United States*, 430 U.S. 188 (1977).

II. Whether the Air Force Court of Military Review erred as a matter of law and violated the principle of *stare decisis* in ruling that the findings of *United States v. Johanns* are limited to the facts of that case.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. BY AFFIRMING THE DECISION OF THE AIR FORCE COURT OF MILITARY REVIEW, THE COURT OF APPEALS FOR THE ARMED FORCES HAS SANCTIONED THE RETROACTIVE APPLICATION OF THE LOWER COURT'S EXPANSION OF WHAT CONDUCT IS CRIMINALLY PROSECUTABLE UNDER ARTICLE 133 OF THE UNIFORM CODE OF MILITARY JUSTICE, IN DIRECT CONFLICT WITH THE EDICT OF THIS HONORABLE COURT IN *MARKS v. UNITED STATES*, 430 U.S. 188 (1977)	5
II. THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW AND VIOLATED THE POLICY OF *STARE DECISIS* IN RULING THAT THE FINDINGS OF *JOHANNS* ARE LIMITED TO THE FACTS OF THAT CASE	12
CONCLUSION	14
APPENDIX A	1a
APPENDIX B	29a

TABLE OF AUTHORITIES

SUPREME COURT CASES:	Page
Marks v. United States, 430 U.S. 188 (1977)	5
Parker v. Levy, 417 U.S. 733 (1974)	8
MILITARY CASES:	
United States v. Appel, 31 M.J. 314 (C.M.A. 1990)	8
United States v. Arthen, 32 M.J. 541 (A.F.C.M.R. 1990)	9
United States v. Boyett, 37 M.J. 872 (A.F.C.M.R. (1993)	*passim*
United States v. Carter, 25 M.J. 471 (C.M.A. 1988)	12
United States v. Cisler, 33 M.J. 530 (A.F.C.M.R. 1983)	9
United States v. Cottrell, 32 M.J. 675 (A.F.C.M.R. 1991)	9
United States v. Fox, 34 M.J. 99 (C.M.A. 1992)	8
United States v. Johanns, 17 M.J. 862 (A.F.C.M.R. 1983)	3
United States v. Johanns, 20 M.J. 155 (C.M.A. 1985)	*passim*
United States v. Jones, 23 M.J. 301 (C.M.A. 1987)	13
United States v. Kroop, 34 M.J. 628 (A.F.C.M.R. 1992)	8
United States v. Kroop, 38 M.J. 470 (C.M.A. 1993)	8
United States v. Miller, 34 M.J. 1175 (A.F.C.M.R. 1992)	9
United States v. Parrillo, 31 M.J. 886 (A.F.C.M.R. 1990)	9
United States v. Pitasi, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971)	13
United States v. Royster, ACM 29875 (A.F.C.M.R. 18 Oct. 1993)	11
United States v. Wales, 31 M.J. 301 (C.M.A. 1990)	8
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. V	5

TABLE OF AUTHORITIES—Continued

UNIFORM CODE OF MILITARY JUSTICE PROVISIONS: Page

Article 133 ..... 7, 8, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. ———

RONNIE D. BOYETT,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

The petitioner, Ronnie D. Boyett, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered on 12 July 1995.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, U.S.C.M.A. Dkt. No. 93-1453, reported at 42 M.J. 150 (1995) is reprinted at Appendix A. The decision of the United States Air Force Court of Military Review, reported at 37 M.J. 872 (A.F.C.M.R. 1993), is reprinted at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 12 July 1995. The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1994) and 10 U.S.C.A. § 867(a) (Supp. 1994).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

There are no disputed facts *per se*. The petitioner was charged and convicted of conduct unbecoming an officer for, *inter alia*, maintaining an "unprofessional close personal social relationship, including sexual intercourse" with a female enlisted person who was not in his chain of command.[1] A sentence including a dismissal and forfeitures of $500.00 pay per month for three months was approved, in accordance with a pretrial agreement.

At trial, petitioner moved to dismiss specification 5 of the charge on the basis that it alleged a fraternization

---

[1] The petitioner was charged with violating Article 133 by: (1) behaving with disrespect by using vulgar language about superior officers, on or about September 27, 1990; (2) lying to a superior officer by denying having sexual intercourse with Airman Yamada, on or about November 14, 1990; (3) having sexual intercourse with Airman Yamada, an enlisted person under his supervision on or about January 5, 1990; (4) making a vulgar statement about Airman Yamada to an enlisted person and civilian employee, on or about August 12, 1990; and (5) engaging in an unprofessional close personal social relationship, including sexual intercourse, with Airman Bremmer, between on or about May 15, 1990 and on or about June 30, 1990. The petitioner pled guilty to the charge and specification 2,3,4, and 5 and was found guilty of each respectively. No plea was entered on specification 1, which was withdrawn after arraignment.

offense which was not "criminally prosecutable" based upon the holding in *United States v. Johanns*, 17 M.J. 862 (A.F.C.M.R. 1983), and its progeny. After maintaining that the court was presented with a factual, rather than legal issue, the military judge denied the motion. R. 19-20, 60, App. Ex. I, II. Ostensibly to preserve his pretrial agreement, during the guilty plea inquiry, petitioner agreed that an Air Force custom existed which proscribes consensual, non-deviate sexual intercourse between officers and enlisted members of the opposite sex, regardless of their superior/subordinate relationship. R. 49. The military judge convinced petitioner that such a custom was criminally prosecutable despite the *Johanns* precedent, as can be seen in the following colloquy:

> MJ: One more question about that and then we'll move on.
>
> The bottom line of what I'm getting to is, are you satisfied on the 15th of May 1990, based upon what you had been told before that time, that you were aware that if you engaged in sexual relations with an enlisted female, even though she didn't work for you, that you could criminally be prosecuted for that conduct?
>
> ACC: Yes.

R. 49.[2]

On appeal, the Air Force Court of Military Review (renamed the Air Force Court of Criminal Appeals

---

[2] The military judge's question can be contrasted with the holding in *Johanns*, 17 M.J. at 869:

> We specifically find that as a matter of fact and law the custom in the Air Force against fraternization has been so eroded as to make criminal *prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable.

Boyett, 37 M.J. at 874.

[hereinafter, Court of Review]), upheld the conviction of specification 5 of the Charge in a five to four *en banc* decision. *United States v. Boyett,* 37 M.J. 872 (A.F.C.M.R. 1993). In that decision the Court of Review held that the ruling in *United States v. Johanns,* 17 M.J. 862 (A.F.C.M.R. 1983) would now be applicable only to the facts of that case. The holding in *Johanns* was that "as a matter of fact and law the custom of the Air Force against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, *unavailable.*" [emphasis added] 17 M.J. at 864.

The Court of Appeals for the Armed Forces [hereinafter, Court of Appeals] granted review of Lieutenant Boyett's petition for review of the issue of the petitioner's denial of the due process of law by the Air Force upholding this conviction for conduct clearly not recognized as criminally prosecutable conduct under *Johanns* and the question of whether the Air Force Court had violated the principle of *stare decisis* in reaching its conclusion.

The Court of Appeals, in a fractured decision, affirmed the decision of the Court of Review in *United States v. Boyett,* 42 M.J. 150 (1995).

REASONS FOR GRANTING THE WRIT

I. BY AFFIRMING THE DECISION OF THE AIR FORCE COURT OF MILITARY REVIEW, THE COURT OF APPEALS FOR THE ARMED FORCES HAS SANCTIONED THE RETROACTIVE APPLICATION OF THE LOWER COURT'S EXPANSION OF WHAT CONDUCT IS CRIMINALLY PROSECUTABLE UNDER ARTICLE 133 OF THE UNIFORM CODE OF MILITARY JUSTICE, IN DIRECT CONFLICT WITH THE EDICT OF THIS HONORABLE COURT IN *MARKS v. UNITED STATES*, 430 U.S. 188 (1977).

In *Marks v. United States*, 430 U.S. 188, 196 (1977), the Supreme Court held that where a judicial decision expands the scope of a criminal statute to make criminal what was previously non-criminal behavior, that new expansion may not be applied retroactively. The Court did not rely on the *ex post facto* provisions of the Constitution since they only apply to legislative acts. Instead, this Court based its ruling on the due process clause of the Fifth Amendment. This same rationale should apply to the case *sub judice*. The appellate courts' failure to follow *Marks* constitutes reversible error. By affirming the Court of Review's decision, the Court of Appeals has sanctioned that Court's failure to follow the Supreme Court's proscription in *Marks* and the violation of the petitioner's due process rights.

Neither appellate court was oblivious to the problematic result of a practical application of their holdings to the petitioner's case. In a dissenting opinion to the Court of Review decision in this case, Chief Judge Dixon recognized that the result of the Court's holding was to retroactively apply a new rule as to what constituted a violation of Article 133. He stated as follows:

> I cannot subscribe to the majority's retroactive re-interpretation of the *Johanns* holding, limiting it solely to the facts of that case. As the majority

> correctly observes, the Johanns holding has influenced a decade of Air Force cases. It has done so because this Court found as *a matter of* law that conduct like that described in specification 5 could not be the basis of criminal prosecution in the Air Force. . . . Regardless of how this Court may choose to apply its current view of the law pertaining to sexual intercourse between officers and enlisted personnel in the future, I believe we are duty bound to recognize that *Johanns* was the controlling precedent 2 years ago when this case was tried.

37 M.J. at 883. Chief Judge Dixon succinctly added, at 884, "An accused cannot make conduct, which is otherwise not subject to criminal sanction, a crime merely by entering a plea of guilty." That is precisely the result of the military appellate courts' decisions. The Court of Review and the Court of Appeals have failed to fully appreciate the *ex post facto* nature of their decisions.

The reasoning proffered in support of the Courts' holdings in the petitioner's case is not clearly laid out in their respective opinions. The Court of Review resolved the issue by limiting its holding in the *Johanns* case to the facts of that case. Over the past ten years since the *Johanns* decision was rendered by the Court of Review, the holding has been treated as applying to all servicemembers. The case was used to delineate which conduct was criminally prosecutable and which was not.

The *Johanns* Court found that the custom against fraternization in the Air Force had been eroded. That erosion went specifically to the prohibition against private, non-deviate, consensual sexual intercourse between officers and enlisted members outside the supervisory chain. In other words, in custom, no such prohibition existed. The legal conclusion was that, where the custom was eroded, it was not enforceable by criminal sanctions.

By retroactively limiting the *Johanns* holding to the facts of that case, the Court of Review was free to exam-

ine the providency of the guilty plea in Lieutenant Boyett's case. The Court found the plea in Lieutenant Boyett's case sufficient to conclude there existed a custom proscribing his conduct of which he was on notice. Interestingly, the Court of Review also stated in its opinion that so long as *Johanns* announced the state of Air Force customs as a matter of fact, no prosecution outside the narrow limits outlined in that opinion could survive Constitutional scrutiny.

One thing that is clear from the Court of Appeals' fractured decision is that the issue of the retroactive application of this new expansion as to what is considered prosecutable conduct under Article 133, UCMJ, has not been directly resolved. Of the four opinions, Chief Judge Sullivan's concurring opinion, comes the closest to squarely addressing the issue. He indicates that had the Court of Review overruled *Johanns,* the *Marks* decision would apply. He, and a majority of the Court of Appeals conclude however, that the Court of Review did not overrule that prior decision. The majority opinion, contrarily suggests that the Court of Review has overruled *Johanns.*

Chief Judge Sullivan misinterprets the ruling of *Marks v. United States.* The holding in that case was not limited to the situation where a later judicial decision "overrules" a prior judicial decision. Rather, the *Marks* case is concerned with the extent to which the new judicial decision imposes criminal liability for conduct which was not previously criminal. Thus, the *Marks* decision does not hinge on the use of the magic term "overruling."

The Chief Judge's opinion maintains that only portions of the *Johanns* Court of Review decision were originally affirmed by the Court of Appeals. The practical result of his analysis on this point, is to retroactively apply a new rule as to the Court of Appeals holding in *Johanns.* This of course, is precisely the action which the petitioner questioned when done by the Court of Review. Notably, other than reversing an additional specification, "[i]n all other

respects, the decision below [was] affirmed." 20 M.J. 155, 161 (C.M.A. 1985). Moreover, the fact that the ultimate holding of the Court of Review in *Johanns* was fully embraced by the Court of Appeals opinion in *Johanns,* is reflected in the Court of Appeals statement in *Johanns* that "Nonetheless, even for an officer private fornication in the absence of some other aggravating circumstance would not seem subject to prosecution under Article's 133 and 134 . . ." 20 M.J. at 159. Now ten years later, the Court wishes to change the plain meaning of their words.

There are only a few strands that connect the four separate opinions in the *Boyett* case, one being the Courts' overall agreement that the information elicited during the guilty plea inquiry was sufficient to satisfy the notice requirement under *Parker v. Levy,* 417 U.S. 733 (1974). Based on the petitioner's statements in the guilty plea inquiry, the Court of Appeals concluded that he had been given adequate notice of the criminality of his behavior.

The appellate courts cannot legitimately rely on petitioner's confusing and mistaken admissions, made during his providency inquiry, as a basis for limiting the holding in *Johanns.* Petitioner's "affirmative admission" that a custom of the service exists which proscribes consensual, non-deviate sexual intercourse between officers and enlisted members, regardless of the existence of a superior/subordinate relationship, does not mean that such a custom exists nor does it make his guilty plea provident. *See, generally, United States v. Fox,* 34 M.J. 99 (C.M.A. 1992); *United States v. Appel,* 31 M.J. 314 (C.M.A. 1990); *United States v. Wales,* 31 M.J. 301 (C.M.A. 1990); *United States v. Kroop,*[3] 34 M.J. 628 (A.F.C.M.R. 1992);

---

[3] *Kroop* was affirmed by this Court at 37 M.J. 470 (C.M.A. 1993). Although *Boyett* was cited to the Court post-oral arguments, no mention is made of *Boyett* in the decision.

United States v. Miller, 34 M.J. 1175 (A.F.C.M.R. 1992); *United States v. Cisler,* 33 M.J. 530 (A.F.C.M.R. 1991); *United States v. Arthen,* 32 M.J. 541 (A.F.C.M.R. 1990); *United States v. Cottrell,* 32 M.J. 675 (A.F.C.M.R. 1991); and *United States v. Parrillo,* 31 M.J. 886 (A.F.C.M.R. 1990), *aff'd,* 34 M.J. 112 (C.M.A. 1992). The essence of the holding in *Johanns* was not so much that such a custom did not exist, but that the custom was sufficiently eroded that a criminal prosecution could not be based upon it. Effectively, *Johanns* killed any custom with respect to private, consensual, non-deviate sexual relations between officers and enlisted members in a non-supervisory relationship—as a matter of law for purposes of criminal prosecution. All members of the Air Force were therefore put on notice that they could not be prosecuted based on such a custom, whether they believe a custom exists or not!

In this case, there appears to have been a great deal of confusion regarding the concept of "notice." When speaking of "notice" an important distinction exists between the "notice" required for pleading purposes, and the "notice" required for making conduct criminal for due process and criminal prosecution purposes. The trial judge, the Court of Review, and now, the Court of Appeals, blurred this important distinction, not only between the two types of notice, but also between notice and "knowledge." The effect is such that no one can be sure which kind of notice or knowledge the petitioner was agreeing he possessed.

These distinctions are critical. Elements of notice and/or knowledge become potential issues in three ways - 1) whether or not an accused's conduct can be criminally prosecutable (due process), 2) whether or not he has been given adequate notice to prepare his defense (proper pleading), and 3) whether an accused's lack of knowledge that certain conduct is proscribed by a statute or regulation can be a defense to a crime. For example, if

a custom of the service proscribes the conduct alleged here, petitioner's knowledge or lack thereof is not relevant—just as would be true if the conduct were proscribed by a lawful general regulation. Ignorance of the law is no defense.

In petitioner's case, his belief or factual state of knowledge regarding customs of the service was not relevant as a defense, nor did it make a difference with respect to the "due process" type of notice. The defense motion regarding "notice" was directed toward the "due process" type of notice mentioned above, although it might well have included the "pleading" notice. In any event, when the Court of Review, in *Johanns*, made the *legal* determination that *criminal prosecutions* alleging fraternization where no supervisory relationship exists were no longer viable, no single accused's factual state of knowledge is capable of overcoming that barrier. Unless and until *Johanns* is properly overturned by statute, regulation or court decision, no Air Force member can be prosecuted for the conduct alleged against petitioner in Specification 5. Therefore, petitioner's "affirmative admission" is of no consequence and does nothing to make his plea provident.

Furthermore, because petitioner's case involved a guilty plea—wherein the *factual* issue of custom was not litigated—this case does not provide an adequate record from which a conclusion can be drawn regarding the existence *vel non* of the custom in question. Petitioner's confused admissions, likely given to preserve the benefits of his pretrial agreement, hardly provide a sufficient factual basis to call into question the mixed factual and legal determination of *Johanns*. Where is the evidence showing that the custom buried by *Johanns* has been raised from the dead?

The Court of Appeals erred in upholding the lower court's decision in this case. Even if the lower court correctly decided that *Johanns* should be limited, it cannot legitimately make that expansive definition of fraterniza-

tion retroactive. Additionally, because the Court of Appeals had affirmed *Johanns*, 20 M.J. 155 (C.M.A. 1985), and applied the law of *Johanns* repeatedly in other cases, the Court of Review's split decision is particularly subject to challenge. An unpublished decision of the Court of Review, *United States v. Royster*, ACM 29875 (A.F.C.M.R. 18 October 1993), which cited *Johanns* and *Boyett*, supports petitioner's position. Captain Royster was not charged with fraternization. However, he was charged with violating Article 133 based on conduct which included asking a female enlisted member he met (who had been his patient) for a date. No superior/subordinate relationship existed between them. The Court of Review stated, "we do not find Captain Royster's conduct in asking Airman C out on a date to be conduct unbecoming an officer subject to criminal prosecution under Article 133." *United States v. Royster*, (ACM 29875, 1993).

In reaching this conclusion, the Court noted that Captain Royster's trial took place after *Johanns* was decided and before Lieutenant Boyett's trial. While the court failed to address the absence of notice, the opinion acknowledged the absence of any custom or policy which prohibited Captain Royster's conduct. The court essentially relied on *Johanns*. There is no rational basis for saying that Lieutenat Boyett's conduct should not have been held to the same standard. After all, he did not have the Air Force appellate court's decision in his own case available to tell him his conduct was any more criminal than Captain Royster's.

The roles of two Court of Review judges (S.J. Johnson and J. Heimburg) of the three-judge panel in *Royster* should not go unnoticed. Both judges voted with the majority in *Boyett*, with J. Heimburg writing the majority opinion, and S.J. Johnson writing the opinion in *Royster*. Petitioner submits that the holdings in *Royster* and *Boyett* are in conflict with respect to the first issue.

Clearly, Lieutenant Boyett did not possess adequate notice that his conduct constituted criminal behavior. Therefore, the finding of guilty of specification 5 should have been set aside and the decision of the Court of Review should have been reversed.

II. THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW AND VIOLATED THE POLICY OF *STARE DECISIS* IN RULING THAT THE FINDINGS OF *JOHANNS* ARE LIMITED TO THE FACTS OF THAT CASE.

Petitioner further maintains that the policy of *stare decisis* applies. The Court of Appeals, in the lead opinion, as well as, the concurring opinion of Judge Gierke and Judge Wiss, state that the policy does not apply since there has been a change in the custom between when the first case was decided and the decision in *Boyett* rendered. Judge Sullivan and Judge Wiss do not believe the question of whether a lower court follows this policy, should be entertained by the Court of Appeals. In *United States v. Carter*, 25 M.J. 471, 473 (C.M.A. 1988), Chief Judge Everett addressed the circumstances in which an appellate court should "be willing to reexamine an earlier precedent. "He mentioned the following factors as justification for not invoking *stare decisis:* 1) when " 'adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience' ", 2) "when persuaded by 'the lessons of experience and the force of better reasoning' that a prior decision is in error", 3) "when new arguments are presented which were not previously considered", and 4) "when the matter at issue is important to the integrity of the military justice system." *Id.*

In noting that "continuity of precedent serves important purposes", Chief Judge Everett failed to add that Congress or, in the case of the Air Force, the President and/or Secretary of the Air Force can change the law where they disagree with a ruling by the court. In this

case, considering the above factors, the passage of time since the *Johanns* ruling, the inaction of Congress, the President, and the Secretary of the Air Force, the principle of *stare decisis* must be applied.

This is particularly true in light of the Court of Appeals' repeated invitations to the military to promulgate regulations detailing the proper scope of officer-enlisted social relationships. *See*, *United States v. Pitasi*, 20 U.S.C.M.A. 601, 608, 44 C.M.R. 31, 38 (1971), cited in *Johanns*, 20 MJ. at 161. The Air Force decision to publish a non-punitive regulation on fraternization, AFR 35-62, 16 April 1990, (atch to App. Ex. 1) should send a clear signal regarding the official position on handling claims of fraternization or unprofessional relationships. The Court of Review had no legitimate basis to revisit the issues settled in *Johanns* a decade ago.

Finally, a question remains regarding the ability of the Air Force appellate court to ignore and or overturn the precedents established by the Court of Appeals in affirming *Johanns* and other Air Force fraternization cases (cited previously) which have come before the Court. Petitioner suggests that even though this law is primarily Air Force law, by placing that Court's *imprimatur* upon it, the law of *Johanns* was outside the power of the lower court, acting under its own authority, to change. *See United States v. Jones*, 23 M.J. 301 (C.M.A. 1987).

The Court of Review's ruling is ultimately most bothersome because it gives credence to the cynical belief that the law is whatever five judges can agree upon, regardless of legal principles. When such a meager guilty-plea record as this is used as a vehicle to make such a major change in law, one is left to speculate about the cause. Only one of the original Court of Review judges who decided *Johanns* voted in *Boyett*. Since *Boyett* was decided, two judges with the majority and three judges with the dissent have left the bench. With this kind of turbulence on the court, there is great potential for estab-

lished law to become more a matter of personal predilection or whim, than a fixed standard to guide conduct. Given that Air Force members face criminal penalties deriving in part from the pronouncements of the appellate courts, major changes should take place only in the context of well litigated issues which have been thoroughly developed, factually and legally, in records of trial. This issue was not so developed and, therefore, must be resolved in favor of Lieutenant Boyett.

CONCLUSION

Petitioner's case should not have been used as a vehicle for the majority of judges on the Court of Review to display their disagreement with the holding in *Johanns*. By their decision and the Court of Appeals affirmance, the appellate court's have taken a confusing providency inquiry and turned it into a confusing statement of law on an issue that was clearly and correctly decided a decade ago. By reaching this holding in the petitioner's case, the Court of Appeals has sanctioned the Court of Review's failure to follow Supreme Court rules as to the retroactive application of an expansion of criminal conduct, despite the fact that this issue was squarely presented by the facts of the case.

WHEREFORE, the petitioner respectfully requests this most Honorable Court grant his request for issuance of a writ of certiorari in this case.

Respectfully submitted,

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

MARGE A. OVERLY
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
Appellate Defense Division
172 Luke Avenue, Suite 343
Bolling AFB, DC 20332-5113

September 1995

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 93-1453

CMR No. 29345

UNITED STATES,

Appellee,

v.

RONNIE D. BOYETT,
Second Lieutenant U.S. Air Force,

Appellant.

Argued Nov. 9, 1994

Decided June 12, 1995

For Appellant: *Captain Marge A. Overly* (argued); *Colonel Jay L. Cohen* and *Lieutenant Colonel Frank J. Spinner* (on brief).

For Appellee: *Major John H. Kongable* (argued); *Colonel Jeffery T. Infelise* and *Lieutenant Colonel Thomas E. Schlegel* (on brief).

Opinion

CRAWFORD, Judge:

1. Appellant was convicted by a military judge sitting alone, in accordance with his guilty pleas, of violating Article 133, Uniform Code of Miltiary Justice, 10 USC

§ 933, for conduct unbecoming an officer and a gentleman. Appellant was sentenced to a dismissal and partial forfeitures, but the convening authority approved the dismissal and reduced the forfeitures by half. Upon review, the en banc Court of Military Review [1] affirmed the findings and the approved sentence. 37 MJ 872 (1993). We granted review on the following issues:

I

WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT WHEN THE AIR FORCE COURT OF MILITARY REVIEW DETERMINED THAT HIS "GUILTY PLEA TO CONDUCT CLEARLY NOT RECOGNIZED AS CRIMINALLY PROSECUTABLE FRATERNIZATION UNDER THE HOLDING IN [*UNITED STATES v.*] *JOHANNS* [I], [17 MJ 862 (1983)] MAY STAND." [*UNITED STATES v. BOYETT*, 37 MJ 872, 874 (AFCMR 1993).]

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW AND VIOLATED THE POLICY OF *STARE DECISIS* IN RULING THAT THE FINDINGS OF *JOHANNS* [I] ARE LIMITED TO THE FACTS OF THAT CASE.

I conclude that appellant was not denied due process of law and that the Court of Military Review did not violate the policy of *stare decisis* in finding that *Johanns I* was limited to its facts.

FACTS

2. At trial, appellant moved to dismiss specification 5, charging that he had "engage[d] in an unprofessional

---

[1] *See* 41 MJ 213, 229 n. * (1994).

close personal social relationship, including sexual intercourse," between May 15 and June 30, 1990, with an enlisted person who did not work for him. Appellant alleged that under *Johanns*, specification 5 did not allege criminal conduct. Denying the motion, the military judge maintained that specification 5 involved a factual rather than a legal issue.

3. During the providence inquiry, appellant acknowledged the Air Force custom proscribing intimate relations between enlisted personnel and officers. R. 49. He understood that such relations could be prosecutable.

4. Appellant admitted having sexual intercourse with Airman X on or about 12 occasions. Most of the contact took place off post at his residence. When asked whether others knew about the relationship, he replied that "people had ideas." It was stipulated that appellant told one noncommissioned officer that if someone saw his relationship, they would think he "played Airman [X] like a puppet." Thus, even though he did not have a supervisory relationship with her, he admitted people would think he was taking advantage of her. When asked whether the thought his "conduct was unbecoming," he replied, "I've been told." There was "some concern" that he was "too friendly with the airmen" in his squadron, and this led to discussion with the squadron commander.

5. As part of the providence inquiry, a stipulation of fact was admitted with the consent of appellant and his defense counsel. The stipulation detailed that, during his precommissioning in August 1989 through the Reserve Officers Training Corps, he learned that it was "against" the custom of the service for officers to date enlisted personnel.

6. When he arrived at his duty station on September 20, 1989, he was counseled by his squadron commander that officer-enlisted relationships were improper. In De-

cember 1989, apparently after a report to the squadron commander, the commander again talked to appellant and told him "that officers do get court-martialed for improper relations with enlisted personnel." The commander described a case in which a female officer from that base was court-martialed for engaging in sexual relations with an airman whom she supervised.

WAIVER

7. We cannot dispose of Issues I and II by applying waiver or relying on the fact that appellant was charged under Article 133. Neither invoking the doctrine of waiver nor alleging the offense as conduct unbecoming under Article 133 avoids the granted issues. A guilty plea does not waive the defect of a specification that fails to state an offense. RCM 907(b)(1)(B), Manual for Courts-Martial, United States, 1984. Further, if appellant does not admit sufficient facts pursuant to *United States v. Care*, 18 USCMA 535, 40 CMR 247, 1969 WL 6059 (1969), and RCM 910(e), to make the pleas provident, the Court is required to set aside the conviction. *Id.*

ARTICLES 133 and 134

8. Alleging an offense under Article 133 [2] rather than specifically alleging fraternization under Article 134 [3] does

---

[2] The elements of a violation of Article 133, Uniform Code of Military Justice, 10 USC § 933, are as follows:

(1) That the accused did or omitted to do certain acts; and

(2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

Para. 59b, Part IV, Manual for Courts-Martial, United States, 1984.

[3] The elements of fraternization charged under Article 134, UCMJ, 10 USC § 934, would be as follows:

(1) That the accused was a commissioned or warrant officer;

not alleviate the Government's burden of establishing a service custom against fraternization. Para. 59c(2), Part IV, Manual, *supra,* provides, concerning Article 133:

> Whenever the offense charged is the same as a specific offense set forth in this Manual, the elements of proof are the same as those set forth in the paragraph which treats that specific offense, with the additional requirement that the act or omission constitutes conduct unbecoming an officer and gentleman.

9. Thus, by electing to charge fraternization under Article 133 rather than Article 134, the Government must also prove the additional element that the act constitutes conduct unbecoming an officer and gentleman. It would not have been necessary to prove this additional element if the offense had been charged under Article 134 as fraternization.

DUE PROCESS STAND

10. Appellant alleges a violation of his due process rights because his conduct was not prosecutable and, thus, specification 5 was void for vagueness. Criminal conduct requires an act, generally by the defendant, *mens rea,* and

---

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Para. 83b, Part IV, Manual, *supra.* This paragraph constitutes explicit notice to servicemembers that fraternization is an offense.

appropriate notice that the act would be criminal. The notice may not be vague; otherwise, there is a possibility of discriminatory prosecution. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." *See, e.g., In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 507-08, 92 L.Ed. 682 (1948) (right to reasonable notice of charges); *Powell v. Alabama,* 287 U.S. 45, 68, 53 S.Ct. 55, 63-64, 77 L.Ed. 158 (1932) (due process requires notice of essential elements). In *Parker v. Levy,* 417 U.S. 733, 752-53, 94 S.Ct. 2547, 2559-60, 41 L.Ed.2d 439 (1974), the Supreme Court remarked that the Court of Military Appeals "has narrowed the very broad reach of the literal language of" Article 133, "and at the same time has supplied considerable specificity. . . ." The Supreme Court recognized that there may still be "sizable areas of uncertainty as to the coverage of the articles." *Id.* at 754, 94 S.Ct. at 2560-61. The Supreme Court asserted that there may be a substantial range of criminal conduct and that

> [b]ecause of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs. . . .

Id. at 756, 94 S.Ct. at 2562.

11. The Court continued:

> Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged.

Id. at 757, 94 S.Ct. at 2562, *quoting United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963) (citations omitted). *See also United States v. Norvell*, 26 MJ 477, 480 (CMA 1988).

12. Appellant alleges that *Johanns II*, 20 MJ 155 (CMA), *cert. denied*, 474 U.S. 850, 106 S.Ct. 147, 88 L.Ed.2d 122 (1985), undercuts the notice requirement. But *Johanns II* does not have the sweeping impact that appellant alleges.

13. In *Johanns I*, a majority of the Air Force Court of Military Review found that

> as a matter of fact and law the custom of the Air Force against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable.

17 MJ at 869.

14. In reaching its conclusion in *Johanns I*, the Court of Military Review began with a historical review of the offense of fraternization. It traced the Air Force history as a part of the United States Army and referred to Air Force standards published in a booklet in 1977. The Court in *Johanns I* noted that, in this booklet, the Air Force did not even discuss fraternization, while indicating that "close personal friendships . . . must not interfere with judgment or duty performance." *Id.* at 865-66. It then reviewed the 1970s directive concerning on-post quarters, open mess regulations, and encouragement "to patronize each others clubs as guests." *Id.* at 866.

15. The above-stated conclusion of "fact and law" is in effect a finding of fact with a legal conclusion completely dependent on three isolated functional areas: housing, messing, and working environs, while disregarding

the historical development behind fraternization. *Id.* at 865-66. *See, e.g.*, Carter, Fraternization, 113 Mil. L.Rev. 61 (1986). The rationale behind class structures did not change. Thus, there is no reason to overrule *Johanns II*, after recognizing that there was a factual finding upon which the decision was based. Indeed Chief Judge Everett said:

> The court below [*Johanns I*] apparently determined that no custom of that service prohibited Captain Johanns' private sexual relationships with several enlisted women. In the face of this determination by a tribunal which has factfinding powers, it must be assumed that Johanns did not receive notice from an Air Force custom or long-established practice that his amorous activities might transgress Articles 133 and 134.

Johanns II, 20 MJ at 160 (footnote omitted).

16. Even in *United States v. Appel*, 31 MJ 314, 319 (CMA 1990), Chief Judge Everett indicated that the issue concerning fraternization by Appel was whether the accused had "fair notice." While "a custom is not a subject for judicial notice," *id.* at 320, it is appropriate to take judicial notice of service regulations, *United States v. Williams*, 3 MJ 155 (CMA 1977). *See also United States v. Mead*, 16 MJ 270 (CMA 1983).

17. Under the *Levy* standard, there is sufficient information in this regard to conclude that there was adequate notice to appellant of his potential criminality. His precommissioning education emphasized that there was a custom against officers "dating" enlisted persons regardless of a supervisory relationship. This was fortified when he was counseled twice by his squadron commander about potential disciplinary action for such activity.

18. While we are not required to do so, even applying the recent standard enunciated in *Posters 'N' Things, Ltd. v. United States*, —— U.S. ——, ——, 114 S.Ct. 1747,

1754, 128 L.Ed.2d 539 (1994), one can conclude that "ordinary people can understand what conduct is prohibited." *See also Staples v. United States,* —— U.S. ——, ——, 114 S.Ct. 1793, 1797, 128 L.Ed.2d 608 (1994) between criminal prohibition not vague if individual can "choose good and evil"), *citing Morissette v. United States,* 342 U.S. 246, 250, 72 S.Ct. 240, 243, 96 L.Ed.2d 288 (1952).

Stare decisis

Appellant alleges that the Court of Military Review in this case violated the policy of *stare decisis* in overruling *Johanns I.*

19. *Stare decisis* is important for stability. *Payne v. Tennessee,* 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991). The doctrine also fosters public confidence in the judicial system and strengthens reliance upon the judicial branch of the government. *Id.* This reliance is even more important in cases involved with economic questions. *See, e.g., Swift & Co. v. Wickham,* 382 U.S. 111, 133-35, 86 S.Ct. 258, 270-71, 15 L.Ed.2d 194 (1965) (Douglas, J., dissenting); B. Cardozo, *The Nature of the Judicial Process* 149 (1921); H. Hart, *The Concept of Law* 156 (1961). The doctrine is not simply based upon nostalgia but is meant to strengthen our judicial system. Under the doctrine of *stare decisis* a decision should not be overruled without examining intervening events, reasonable expectations of servicemembers, and the risk of undermining public confidence in the law. *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Ass'n,* 450 U.S. 147, 151-55, 101 S.Ct. 1032, 1035-37, 67 L.Ed.2d 132 (1981) (Stevens, J., concurring).

20. But the doctrine does not apply when a statute,[4]

[4] Amendment to Article 2, UCMJ, 10 USC § 802, was designed to legislatively overrule *United States v. Russo,* 1 MJ 134 (CMA

executive order,[5] or other basis [6] for a decision changes. In this instance, the Court of Military Review found that the factual basis for the decision in *Johanns I* had changed. Thus, in this case, the decision below is consistent with the doctrine of *stare decisis*.[7]

21. Because the court below implicitly overrules *Johanns I*, we will examine the intervening events, reasonable expectations of servicemembers, and the risk of undermining public confidence in the law.

22. Before we examine intervening events following *Johanns I*, we will look at the historical development of the proscription against fraternization in the armed forces. The proscription against improper relationships between servicemembers of different ranks, now commonly referred to as fraternization, descended from the Roman ranks.[8]

1975), and *United States v. Catlow*, 23 USCMA 142, 48 CMR 758, 1974 WL 13909 (1974). *See* R.Rep. No. 197, 96th Cong., 1st Sess. 121-23 (1979), *reprinted in* 1979 U.S.Code Cong. & Admin. News 1826-28. *See also United States v. Clardy*, 13 MJ 308 (CMA 1982).

[5] *United States v. Kossman*, 38 MJ 258 (CMA 1993), overruled *United States v. Burton*, 21 USCMA 112, 44 CMR 166, 1971 WL 12477 (1971).

[6] *United States v. Johnston*, 41 MJ 13 (CMA 1994), overruled *United States v. Arguello*, 29 MJ 198 (CMA 1989). *United States v. Teters*, 37 MJ 370 (CMA 1993), *cert. denied*, —— U.S. ——, 114 S.Ct. 919, 127 L.Ed.2d 213 (1994), overruled *United States v. Baker*, 14 MJ 361 (CMA 1983).

The denial of eight petitions for reconsideration left a number of decisions without precedential effect. *See, e.g., United States v. Davis*, 9 MJ 254-64 (CMA 1980).

[7] The decision by the court below, as with most decisions, have their bases in the Constitution, Uniform Code, Manual for Courts-Martial, and case law. Because of these bases, a higher court, such as this Court, may review decisions of a court below.

[8] B. Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* (Book The Third) 175, 180 (J. Bate trans.) (Reprinted 1964) (Roman law recognized

Military organizations are made up of people who carry out various missions. These individuals must respect and trust one another. Actual or apparent partiality, preferential treatment, or improper use of rank prejudices good order, discipline, and high unit morale. This was recognized in *Johanns I*:

> Anyone who believes that a leader can mechanically assign a "friend" to unpopular or hazardous duty is unrealistic. Axiomatically, the troops will be highly aware of the duties assigned to an enlisted person(s) with whom an officer habitually associates or consorts. That is the prejudice to good order and discipline which the line between ranks is meant to prevent; and an officer and a gentleman will endeavor to keep oneself [sic] on the appropriate side of that line.

17 MJ at 872 (Snyder, J., concurring in part and dissenting in part).

23. In his concurring opinion in this case Judge James points out that what individuals do within "technical functional 'communities'" does not undermine the relationship that must exist between officers and enlisted members. 37 MJ at 881.

24. *Intervening Events.* Following *Johanns I* there have been significant changes in the structure and organization of the armed forces which serve to reinforce the historical proscription against improper relationships between servicemembers of different ranks. The emphasis today is toward jointness: joint commands, joint task forces, and uniformity as to the treatment of relationships among servicemembers not only of different ranks but also of different branches of the armed forces. Indicative of

---

that undue familiarity would have an adverse effect on discipline). *See also* W. Winthrop, *Military Law and Precedents* 716 (2d ed. 1920 Reprint).

the emphasis on jointness is the enhanced position of the Chairman of the Joint Chiefs of Staff—10 USC §§ 151 and 153 (1986). All of these factors are significant intervening events since *Johanns I*.

25. Additionally, the old Air Force regulation concerning professional relationships indicated relationships between Air Force members were "normally matters of individual judgment." Para. 7c, Air Force Regulation (AFR) 30-1, Professional Relationships at 20 (4 May 1983). However, paragraph 2a, AFR 35-62, Policy on Fraternization and Professional Relationships (16 Apr. 1990), is much more stringent.

26. *Reasonable expectations.* As demonstrated by the fact in this case and in a number of cases that have distinguished *Johanns I*, overruling it does not undermine the expectations of servicemembers even in the Air Force. The administration by a service of published opinions, policy proclamations, and regulations, as well as training, has an impact on the expectations of servicemembers. As Judge James asserted, the "published opinions of The Judge Advocate General [of the Air Force] suggest the vitality . . . of the general custom against fraternization" in the Air Force. 37 MJ at 880 n.12. As was demonstrated in this case, appellant was well aware of what behavior would constitute improper relationships among the ranks.

27. *Public confidence in the law.* Foremost, public confidence in the law would be undermined if national security was jeopardized as a result of improper relationships. Again as Judge James stated:

> Fraternization remains an issue because it bears on leadership, discipline, and command. We are a community mainly of good soldiers who do not conduct themselves such that leadership, discipline, and command are impaired. Our views of our service are reflected in our views on what is and is not accept-

> able behavior. The *Johanns* [*I*] majority, however, looked simplistically to erosion of caste distinctions and diagnosed the end of the custom prematurely, after only a superficial examination.

37 MJ at 880-81.

28. Overruling *Johanns I* strengthens prior cases as to the responsibility of a military officer and is consistent with the historical development of fraternization as well as with intervening developments. We noted in *United States v. Frazier,* 34 MJ 194, 198 (CMA 1992), "that one critically important responsibility of a military officer is to inspire the trust and respect of the enlisted soldiers who must obey his orders and follow his leadership." *See also United States v. Hartwig,* 39 MJ 125 (CMA 1994); *United States v. Maderia,* 38 MJ 494 (CMA 1994); *United States v. Moore,* 38 MJ 490 (CMA 1994).

The decision of the United States Air Force Court of Military Review is affirmed.

COX, Judge (concurring):

29. The lead opinion reflects the views that I have long held, *see United States v. Johanns*, 20 MJ 155, 161 (CMA) (Cox, J., concurring in part, concurring in the result in part), *cert. denied*, 474 U.S. 850, 106 S.Ct. 147, 88 L.Ed.2d 122 (1985); *United States v. Wales*, 31 MJ 301, 310 (CMA 1990) (Cox, J., dissenting in part and concurring in the result), and I fully concur. Naturally, any conduct charged as a violation of Article 133 or 134, Uniform Code of Military Justice, 10 USC § 933 or 934, respectively, must be such that an accused servicemember is fairly on notice of its proscription. *Parker v. Levy*, 417 U.S. 733, 752-54, 94 S.Ct. 2547, 2559-61, 41 L.Ed.2d 439 (1974).

30. Regarding "fraternization," whether charged as a violation of Article 133 or 134, I take it that paragraph 83 ("Fraternization"), Part IV, Manual for Courts-Martial, United States, 1984, constitutes rather explicit notice to servicemembers. I have never agreed with those who would argue that the Service Secretaries need to promulgate some special regulation in order for fraternization to become chargeable as an offense. We might recall that the Manual for Courts-Martial is an Executive Order promulgated by the Commander in Chief, an authority superior to the Service Secretaries. Persons arguing against the wisdom of outlawing fraternization in the services should address their appeals there.

31. In my view, the only thing left to debate in a given case is whether the particular conduct is prejudicial to good order and discipline and, thus, constitutes fraternization or conduct unbecoming an officer by fraternizing. I take it that even the most ardent advocates concede that sexual intercourse by a superior officer with a subordinate service-member takes it over the line of "equality," the *sine qua non* of fraternization (or "sororitization" as the case may be).

SULLIVAN, Chief Judge, with whom WISS, Judge, joins (concurring in the result):

32. This appeal from a conviction based on a guilty plea raises two particular questions for me. First, was appellant's actions as charged and admitted "conduct unbecoming an officer," in violation of Article 133, Uniform Code of Military Justice, 10 USC § 933? *See Parker v. Levy*, 417 U.S. 733, 752-55, 94 S.Ct. 2547, 2559-61, 41 L.Ed.2d 439 (1974). Second, if his actions were conduct unbecoming an officer, did appellant have "fair notice" that his actions would constitute this criminal offense? *Id.* at 755-57, 94 S.Ct. at 2561-62. I do not accept the lead opinion's assumption that fraternization was impliedly charged in this case or its suggestion that appellant's case can be resolved solely on the basis of paragraph 83b(4), Part IV, Manual for Courts-Martial, United States, 1984.[1]

33. Assuming appellant was found guilty of fraternization, I would join Judges Gierke and Wiss in affirming appellant's conviction solely on the basis of his guilty-plea responses. In particular, I disagree with the lead opinion's suggestion that the Air Force Court of Military Review in this case (37 MJ 872, 877-78 (1993)) overruled its own prior decision in *United States v. Johanns*,

---

[1] In 1984, the President promulgated the Manual for Courts-Martial, United States, and delineated "fraternization" as a crime under Article 134, Uniform Code of Military Justice, 10 USC § 934. He further provided that the Government must prove as a matter of fact that "such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality." Para. 83b(4), Manual for Courts-Martial, United States, 1984. In *United States v. Fox*, 34 MJ 99, 102-03 (1992), this Court held that it was a question of fact whether an accused's particular service prohibited certain conduct as unlawful fraternization as a matter of custom. Accordingly, the lead opinion's finding of criminality and adequate constructive notice on the basis of paragraph 83 alone is in my view plainly erroneous. *See generally Parker v. Levy*, 417 U.S. 733, 755-57, 94 S.Ct. 2547, 2561-62, 41 L.Ed.2d 439 (1974).

17 MJ 862 (1983), on the scope of criminal fraternization in the Air Force. Moreover, I strongly object to the United States Court of Appeals for the Armed Forces reviewing the lower court's purported failure to apply the doctrine of *stare decisis* to its own decision. *See United States v. Johanns*, 20 MJ 155 (CMA), *cert. denied*, 474 U.S. 850, 106 S.Ct. 147,88 L.Ed.2d 122 (1985). Finally, if the Air Force Court of Military Review overruled *United States v. Johanns*, 17 MJ 862, in this case as suggested by the lead opinion, it cannot avoid considering the Supreme Court decision in *Marks v. United States*, 430 U.S. 188, 196, 97 S.Ct. 990, 995, 51 L.Ed.2d 260 (1977) (due process violation to prosecute for criminal conduct not criminalized at time of offense but later criminalized by subsequent expansive judicial decision).[2]

34. The issues raised in this case set the legal snare which has caused the lead opinion to stumble. They state:

> I
>
> WHETHER APPELLANT WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT WHEN THE AIR FORCE COURT OF MILITARY REVIEW DETERMINED THAT HIS "GUILTY PLEA TO CONDUCT CLEARLY NOT RECOGNIZED AS CRIMINALLY PROSECUTABLE FRATERNIZATION UNDER THE HOLDING IN *JOHANNS* [1] MAY STAND." [2]

---

[1] *United States v. Johanns*, 17 MJ 862 (AFCMR 1983)

[2] *United States v. Boyett*, 37 MJ 872, 874 (AFCMR 1993).

---

[2] Unlike the lead opinion, I need not address appellant's argument under *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), because I conclude the portion of *United States v. Johanns*, 17 MJ 862 (AFCMR 1983), on the scope of Article 133, UCMJ, 10 USC § 933, was implicitly overruled by the decision of this Court in *United States v. Johanns*, 20 MJ 155 (CMA), *cert. denied*, 474 U.S. 850, 106 S.Ct. 147, 88 L.Ed.2d 122 (1985). This took place long before the occurrence of appellant's conduct in 1990.

II

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW AND VIOLATED THE POLICY OF *STARE DECISIS* IN RULING THAT THE FINDINGS OF *JOHANNS* ARE LIMITED TO THE FACTS OF THAT CASE.

35. Quite candidly, the phrasing of these issues is rather presumptuous. The first issue assumes that the portion of the decision of the Air Force Court of Military Review in *United States v. Johanns*, 17 MJ 862 (1983), concerning the scope of Article 133 survived the decision of this Court in *United States v. Johanns*, 20 MJ 155. I do not share this view. *United States v. Kroop*, 38 MJ 470, 473 (CMA 1993) (Sullivan, C.J., concurring in part and in the result); *United States v. Wales*, 31 MJ 301, 310 (CMA 1990) (Sullivan, J., concurring in part and in the result); *United States v. Appel*, 31 MJ 314, 322 (CMA 1990) (Sullivan, J., concurring in part and in the result). Assuming it did survive our decision in *United States v. Johanns*, 20 MJ 155, the second granted issue further assumes that it is this Court's role to enforce the doctrine of *stare decisis* in a lower court and ensure that the court below follows its own decisions. No authority is proffered for this novel use of the doctrine of *stare decisis* and I do not believe such a question should be entertained by this Court. *See United States v. Felix*, 40 MJ 356, 359 (CMA 1994). *Cf. Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1122-24 (7th Cir. 1987) (District court decision that it was required to follow a different district court's decision because of doctrine of *stare decisis* found erroneous by a court of appeals.)

I

TRIAL MOTION

36. Appellant was charged with conduct unbecoming an officer, in violation of Article 133. The specification of this Charge does not expressly allege fraternization but instead states:

> Specification 5: In that [appellant] did, at or near Great Falls, Montana, on divers occasions between on or about 15 May 1990 and on or about 30 June 1990, wrongfully, dishonorably, and disgracefully engage in an unprofessional close personal social relationship, including sexual intercourse, with Airman [MRB], an enlisted person.

37. Prior to entering a plea to this charge, appellant made a motion to dismiss this charge "for failure to state an offense." He submitted a written motion which characterized this offense as "fraternization" and asserted:

> There is no crime here. Officers engaging in mutually voluntary, private, nondeviate sexual intercourse with enlisted members, neither under their command nor supervision, are not violating the article prohibiting conduct unbecoming an officer or the article prohibiting conduct prejudicial to good order and discipline. *US v. Johanns*, 20 MJ 155 (CMA 1985). Further, "if the Air Force elects to prosecute and punish private sexual intercourse between an officer and an enlisted person not under his command or supervision, then . . . it *must promulgate specific punitive regulations forbidding the unwanted conduct* (emphasis added)." *US v. Wales*, 31 MJ 301 at 307 (CMA 1990). The Air Force issued AFR 35-62, entitled "Policy on Fraternization and Professional Relationships," but this is not a punitive regulation. *See Wales, supra* and AFR 35-62.

38. The Government objected to characterization of appellant's offense as "fraternization" and insisted that

appellant was lawfully charged with "conduct unbecoming an officer." The military judge initially declined to rule on this motion until evidence was presented to him as to whether a custom existed in the Air Force prohibiting such conduct between an unmarried officer and an enlisted person. Appellant again insisted that, as a matter of law, he could not be prosecuted for the charged offense unless a service regulation had been promulgated prohibiting it. He relied on the decisions of the United States Court of Military Appeals in *United States v. Wales,* 31 MJ at 307, and *United States v. Johanns,* 20 MJ 155. The military judge implicitly rejected the characterization of this offense as fraternization and the argument that a punitive regulation was required to punish the charged conduct.

39. The record of trial on this matter states:

> MJ: Captain Peterson [defense counsel], you have a motion before me to have this specification dismissed, as it fails to state an offense. What do you want to do?
>
> DC: Well, Sir, the defense's position is that it's not a factual issue, that it's a legal issue under the case law, and that you can make a ruling based on the law as it stands under *Johanns, Wales,* and [*U.S. v.*] *Arthen* [32 MJ 541 (AFCMR 1990)]. The case law says there must be a punitive regulation and there is no punitive regulation.
>
> We understand that you said you think it's a factual issue, and the Government has asked for you to defer ruling and we are ready to enter pleas in the case and proceed.
>
> MJ: Okay. Notice can be shown either by punitive regulation or by a custom of the service.
>
> DC: Yes, Sir.
>
> MJ: We agree that there's no punitive regulation, but what I've done is given trial counsel the opportunity to provide the evidence if there is some custom

of the service which makes the misconduct criminal and that your client was on notice of it.

DC: Yes, Sir.

MJ: Now, we can go to pleas. If he pleads not guilty to that specification, then I can certainly make that determination when I make the determination on the factual issue. I can do them all at the same time; rule on the motion and on the factual issue of guilt and innocence at the same time.

DC: Yes, Sir.

MJ: If your client's going to plead guilty to that, then . . .

DC: Yes, Sir, I understand.

MJ: . . . you know, his *Care* Inquiry may be interesting.

DC: Yes, Sir, and we are probably facing an interesting *Care* Inquiry, Sir.

MJ: Okay. Fine. So, you are willing to have me defer ruling on the motion?

DC: Yes, Sir.

MJ: Are you prepared to enter pleas?

DC: Yes, Sir.

MJ: Go ahead.

DC: Lieutenant Boyett pleads to specifications 2, 3, 4, and 5 of the Charge and the Charge, guilty.

MJ: Your client then is pleading guilty to the specification which is in issue, specification 5?

DC: Yes, sir.

II

SCOPE OF ARTICLE 133 OF THE CODE

40. The first question I must address is whether the military judge and the Court of Military Review erred in failing to grant appellant's motion based on our decisions which purportedly established a punitive-regulation requirement for prosecution of fraternization under Article 133. Admittedly, this was one of the holdings of the Air

Force Court of Military Review in its decision in *United States v. Johanns*, 17 MJ at 869 n. 21 with respect to the criminal offense of fraternization. Moreover, this Court long ago suggested such an approach to prosecuting fraternization under Article 133 should be followed. *See United States v. Pitasi*, 20 USCMA 601, 44 CMR 31, 1971 WL 12439 (1971).

41. Of course appellant in this case was not expressly charged with fraternization or association "on terms of military equality" with enlisted persons. *See* para. 83b(2) and f, Part IV, Manual, *supra*. In any event, this Court did not affirm that portion of the opinion of the Air Force Court of Military Review in *United States v. Johanns*, 17 MJ at 869 n. 21, which required a punitive regulation for the prosecution of fraternization. *See United States v. Johanns*, 20 MJ 155. Finally, this view of the scope of Article 133 has not commanded a majority of this Court in any of our subsequent cases. *See United States v. Kroop*, 38 MJ 470; *United States v. Appel*, 31 MJ 314; *United States v. Wales*, 31 MJ 301. Accordingly, the military judge and the Court of Military Review did not err in upholding the refusal to grant appellant's motion to dismiss on the basis that no service regulation prohibited fraternization.

42. The next question I must address is whether the military judge and the Court of Military Review erred in holding that violation of a service custom may serve as a basis for prosecution of appellant's conduct of unbecoming an officer under Article 133. The Supreme Court in *Parker v. Levy, supra*, clearly indicated that conduct in violation of a custom was within the scope of Article 133; however, it also indicated such a custom was not the sole means of establishing whether an Article 133 violation occurred. In fact, in *Parker v. Levy, supra*, the conduct was found to be a violation of Article 133 because it breached a provision of the Manual for Courts-Martial explaining conduct violative of that article. The Supreme

Court also noted that conduct found to be unbecoming an officer by decisions of the Court of Military Appeals and other "*authoritative* military sources" would further narrow the scope of the statute. *Id.* at 754, 94 S.Ct. at 2561 (emphasis added). Accordingly, I conclude that the miliatry judge and the Court of Military Review did not err in ruling that conduct in breach of a service custom may be prosecuted under Article 133. *See also* para. 83b(4), Part IV, Manual, *supra.*

43. A third question I will address is whether the military judge and the Court of Military Review correctly held that appellant's conduct fell within the lawful scope of Article 133. *See Parker v. Levy, supra.* To resolve this question, I first must note the specifics of that conduct and the circumstances which appellant admitted in his guilty plea responses surrounded it. He, as an officer, was charged with "engag]ing[in an unprofessional close personal social relationship . . . with an enlisted" woman. The circumstances shown to be "dishonorabl[e] and disgraceful" were that both were stationed at the same base but assigned to different units; the relationship was subsequently disclosed to another enlisted person; appellant appeared to be sexually exploiting the enlisted woman; and appellant knew this conduct violated a custom of the Air Force.

44. Clearly, this was not the non-exacerbated fraternization situation presented in *United States v. Johanns,* 17 MJ at 868. In that case there was no suggestion of sexual exploitation of an enlisted person or military awareness of this destructive relationship or any concession that a custom of the service prohibited such conduct by an officer. Regardless whether this conduct should properly be considered fraternization, it squarely falls within the authoritative military law precedents prohibiting sexually demeaning conduct by an officer. These numerous precedents were cited by one of the dissenting judges in *United States v. Johanns, supra* at 884-85 n. 15.

45. Judge Miller, a partially dissenting judge in the decision of the court in *United States v. Johanns*, 17 MJ at 882-83, made this point in his separate opinion in that case:

> The sole question before us for decision is whether the factually detailed misconduct alleged within the instant Article 133 specifications, under the circumstances of this case, is immediately recognizable by a reasonably prudent officer as an example of conduct that would subject him to potential prosecution for conduct unbecoming an officer and a gentleman.
>
> Unfortunately, by limiting their discussions of the history of "fraternization type cases" to those few cases which actually contained the term "fraternize" or "fraternization," my fellow judges also overlooked some exceptionally useful and exceptionally relevant generalizations pertinent to the resolution of this quintessential question. Had they expanded their research so as to encompass those cases which, although not mentioning the term "fraternization," nevertheless, dealt with specific allegation of officer/enlisted misconduct alleged to have violated one of the general articles, they would have been able to glean four distinct categories of officer/enlisted behavior recognized time and again by our appellate courts as violating the proper criteria of Article 133 and 134 offenses. Even more importantly, they might have recognized that the behavior alleged, here, falls distinctly within the fourth of these actionable categories, *demeaning sexual behavior.*

(Footnote omitted; emphasis added.)

46. I agree and would hold that appellant's conduct under the circumstances of this case demeaned him as an officer and undermined his ability to lead. *See also United States v. Frazier*, 34 MJ 194, 198 (CMA 1992) (and cases cited therein). I further agree with Judge

Miller that ample military legal precedent (17 MJ at 882 n. 15) existed which delineated it as conduct unbecoming an officer, in violation of Article 133. *See United States v. Boyett*, 37 MJ at 880 n. 12 (James, J., concurring). Finally, I agree with the Court of Military Review that, if appellant's conduct constituted fraternization, then his guilty-plea responses also established that his conduct violated a service custom as delineated in *Porker v. Levy*, 417 U.S. at 752-55, 94 S.Ct. at 2559-61, and paragraphs 83b(4) and 59c(2), Part IV, Manual, *supra*. Appellant admitted there was a custom in the Air Force prohibiting fraternization between an officer and an enlisted person, including sexual intercourse.

III

FAIR NOTICE THAT CONDUCT VIOLATED ARTICLE 133

47. The second issue in this case is whether appellant was provided fair notice that his conduct was a crime under Article 133. Clearly, *Parker v. Levy, supra* at 755-57, 94 S.Ct. at 2561-62, provides that at least constructive notice of the criminality of a servicemember's conduct is required by the Due Process Clause of the Fifth Amendment. Such notice can be shown by proof of an authoritative court decision including such conduct as punishable under Article 133; a provision of the Manual for Courts-Martial explaining conduct as a violation of Article 133; or a custom of the service prohibiting such conduct or any other circumstance which would establish that a servicemember would have no reasonable doubt that his conduct was unbecoming an officer. *Id.* In *United States v. Johanns*, 20 MJ at 161, this Court simply held that Captain Johanns in 1982 did not have adequate notice from any of the above sources or anywhere else that his conduct was proscribed under Article 133.

48. More particularly, this Court in *United States v. Johanns*, 20 MJ at 161, held that Captain Johanns was

denied due process of law under the Fifth Amendment when he was convicted of conduct unbecoming an officer by fraternizing with 3 different enlisted women. One of the dismissed specifications specifically alleged that appellant shared a bed with the enlisted woman; the other two specifically alleged acts of sexual intercourse with the enlisted women. *See United States v. Johanns,* 17 MJ at 863-64 n. 1. This Court affirmed the lower court's dismissal of these specifications for the following reason:

> With respect to the case at bar, it appears that Captain Johanns *lacked the notice from custom or otherwise* which, even under the relaxed standard of review established by *Parker v. Levy, supra,* is constitutionally necessary to meet the due process requirements of the Fifth Amendment. Therefore, the Court of Military Review properly dismissed specification 2, 3, and 4 of Charge I; and the two certified questions must be answered in the affirmative. Because of multiplicity, Charge II and its specification must also be dismissed. *United States v. Rodriguez,* 18 MJ 363 (CMA 1984)

(Emphasis added.)

49. I do not read *United States v. Johanns,* 20 MJ at 161, as holding that an officer in the Air Force could never, as a matter of law, have adequate notice that his sexual relationship with an enlisted woman violated Article 133. Indeed, such an idea is preposterous in view of the 10-year time period involved and the myriad of circumstances in which such a sexual relationship could occur. In addition, I note that appellant at his trial did not expressly argue that he was denied fair notice of the criminality of his conduct but instead exclusively relied on his required-punitive-regulation theory. Finally, as part of his guilty plea responses, appellant openly conceded that his conduct violated a custom of the Air Force, that he knew that it violated that custom, and that he knew that such conduct was unbecoming an officer. I agree

with the Court of Military Review that this due process issue is resolved in appellant's case by his own words admitting constructive and actual notice. *Cf. United States v. Fox*, 34 MJ 99, 103-04 (CMA 1992) (contested trial where inadequate instruction given on factual question of custom).

50. In sum, for the above reasons, I find appellant's conduct violated Articlie 133 of the Code. Therefore, I vote to affirm the decision below holding his guilty pleas to this offense to be provident.

GIERKE, Judge, with whom WISS, Judge, joins (concurring in the result):

52. I join the majority in answering Issue I in the negative. Appellant was not denied due process. The specification gave him adequate notice of the offense charged, and he admitted actual knowledge of a custom against fraternization and admitted that his conduct violated that custom.

52. Issue I involves two distinct aspects of notice: (1) notice based on the language of the pleadings, and (2) notice based on the language of the statute. Appellant does not challenge the sufficiency of the pleadings. *See United States v. Norvell*, 26 MJ 477 (CMA 1988). Instead, he argues that he "did not possess adequate notice that his conduct constituted criminal behavior." Final Brief at 6.

53. Regarding the second aspect of notice, appellant's "void for vagueness" argument is belied by his sworn responses during the guilty-plea inquiry. As explained by the Supreme Court, "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." *Parker v. Levy*, 417 U.S. 733, 757, 94 S.Ct. 2547, 2562, 41 L.Ed.2d 439 (1974), *quoting United States v. National Dairy Products Corp,*

372 U.S. 29, 32-33, 83 S.Ct. 594, 597-98, 9 L.Ed.2d 561 (1963), and citing *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 811-12, 98 L.Ed. 989 (1954). Appellant's responses establish that he had actual notice that his conduct constituted criminal behavior. He admitted that he was aware of an Air Force custom against fraternization. He further admitted that he knew violation of that custom subjected him to criminal prosecution and that he violated the custom. Those responses satisfy the requirement that an accused "reasonably understand" his conduct is proscribed.

54. I decline to join the examination of the changes in Air Force policy to determine if there was a custom against appellant's conduct. We should confine ourselves to "the four corners of the record" in determining the providence of a guilty plea. *See United States v. Rooks*, 29 MJ 291, 293 (CMA 1989).

55. Furthermore, this effort to determine what is current Air Force policy necessarily involves factfinding. Our Court has consistently treated the question whether there is a custom against fraternization as a question of fact. *See United States v. Johanns*, 20 MJ at 160 ("In the face of this determination by a tribunal which has factfinding powers . . . ."); at 165 (footnote omitted) (Cox, J.) ("I am prepared to defer to the expertise and factfinding authority of the Court of Military Review . . . ."). *See also United States v. Appel*, 31 MJ 314, 320 (CMA 1990) (Everett, C.J.) (Custom may not be judicially noticed under Mil.R.Evid. 201A) (Judicial notice of law), Manual for Courts-Martial, United States, 1984, because it is a question of fact; it must qualify for judicial notice under Mil.R.Evid. 201(b) (Judicial notice of adjudicative facts).

56. In this case the Court of Military Review declined to make findings of fact regarding the existence of a custom at the time of Lieutenant Boyett's alleged misconduct. 37 MJ at 878. Our Court has no factfinding power

and accordingly lacks authority to make a finding of fact that the Court of Military Review declined to make, especially on a guilty plea record. Art. 67(c), UCMJ, 10 USC § 867(c) (1989). *See United States v. Harrison*, 26 MJ 474 (CMA 1988). Accordingly, I decline to join in any holding, based on evidence outside the guilty-plea inquiry, regarding the existence of a custom against fraternization in the Air Force.

57. I join the lead opinion in answering Issue II in the negative. The doctrine of *stare decisis* applies to questions of law, not findings of fact. *Johanns* found, as a matter of fact, that there was no custom against fraternization in the Air Force at that time. In appellant's case the Court of Military Review did not overrule *Johanns*, but correctly held (37 MJ at 878) that *Johanns* was limited to its facts. *See United States v. Kroop*, 38 MJ 470, 475 (CMA 1993) (Gierke, J., dissenting) (absence of a custom in October 1981 does not mean that there was not a custom when Colonel Kroop was tried).

For the foregoing reasons, I concur in the result.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 29345

UNITED STATES

v.

SECOND LIEUTENANT RONNIE D. BOYETT
422-15-4849, United States Air Force

Sentence Adjudged 29 April 1991

Decided 2 July 1993

Appellate Counsel for the Appellant: Lieutenant Colonel Frank J. Spinner (argued), Colonel Jeffrey R. Owens, Colonel Terry J. Woodhouse, and Captain Ursula P. Moul.

Appellate Counsel for the United States: Major Paul H. Blackwell, Jr. (argued), Colonel Richard L. Purdon, Lieutenant Colonel Brenda J. Hollis, and Lieutenant Colonel Jeffery T. Infelise.

Before DIXON, O'HAIR, LEONARD,* McLAUTHLIN,* SNYDER, JAMES, JOHNSON, GRUNICK, and HEIMBURG, Appellate Military Judges, En Banc.

---

* Senior Judges LEONARD and McLAUTHLIN participated in this decision before their departure from the court.

OPINION OF THE COURT

HEIMBURG, Judge:

Lieutenant Boyett pleaded guilty to four specifications of conduct unbecoming an officer,[1] one of which (specification 5) alleged an "unprofessional close and personal social relationship" with an enlisted member who was neither his subordinate nor a member of his unit.[2] He appeals, arguing specification 5 fails to state an offense in light of this Court's *Johanns* decision.

In *United States v. Johanns*, this Court held "as a matter of fact and law the custom against fraternization [in the Air Force] has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, nondeviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable." 17 M.J. 862, 869 (A.F.C.M.R. 1983). Today, we address whether a guilty plea to conduct clearly not recognized as criminally prosecutable fraternization under the holding in *Johanns* may stand. We limit the findings of *Johanns* to the facts of that case and affirm Lieutenant Boyett's guilty plea.

---

[1] In violation of Article 133, UCMJ, 10 U.S.C. § 933 (1988): "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[2] Before a military judge sitting as a general court-martial, Lieutenant Boyett also pleaded guilty to making a false official statement to the officer who conducted the initial investigation of the allegations which resulted in these charges, having sexual intercourse with a female airman who worked for him, and making an obscene and demeaning declaration about that airman in the presence of two other subordinates. His approved sentence is dismissal from the service and forfeiture of $500 pay per month for 8 months.

BACKGROUND

Article 133, UCMJ, proscribes "conduct unbecoming an officer and a gentleman." On its face, this historic[3] article does not mention "custom" and seems to have nothing whatever to do with the punishment of violations of "custom." What, then, is the significance of the reference to "the custom against fraternization" by the *Johanns* majority? For the answer, we turn to the Supreme Court case which upheld Article 133 against claims that it violated the Due Process clause of the Fifth Amendment, as "void for vagueness" and "overbroad."

In *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), Article 133 was attacked as too vague to sustain criminal sanctions. In upholding its constitutionality, the Supreme Court observed that decisions of the Court of Military Appeals, precedents incorporated over the years into manuals for courts-martial, and generally recognized customs of military service have had the effect of both narrowing the "very broad reach" of the article and supplying "considerable specificity by way of examples of the conduct which they cover." *Parker v. Levy*, 417 U.S. at 754, 94 S.Ct. at 2561. As for the "sizable areas of uncertainty" which remain after resort to such sources of "official interpretation by authoritative sources, further content may be supplied . . . by less formalized custom and usage." *Id.*

At least since *Parker v. Levy*, then, it is clear that specifications under Article 133 may be sustained against "due process" attack only if they are defined by military precedent, but that precedent can include the common law of historic military traditions and customs. This is

---

[3] A predecessor of this article was included in the British Articles of War of 1765, in effect at the beginning of the Revolutionary War, and in American military codes of 1775, 1776, and 1786. W. Winthrop, MILITARY LAW AND PRECEDENTS 945, 957, 969, and 974 (2d. ed. 1920 reprint). It was revised in 1806 to substantially its present form. Winthrop, *supra* at 710, 983.

where the existence of a "custom of the service" becomes relevant: it is one means of giving officers notice of the legal limits imposed by their military status on otherwise permissible behavior, thus meeting the due process requirements of the Constitution.[4] Customs of the service help to define behavior which is "unbecoming an officer and gentleman," "prejudicial to good order and discipline," or "of a nature to bring discredit upon the armed forces," under Articles 133 and 134, UCMJ.

UNITED STATES v. JOHANNS

In *Johanns*, a majority of this Court found "as a matter of fact and law the custom of the Air Force against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable." 17 M.J. at 869 (emphasis in original). This statement, although termed a finding "of fact and law," actually amounted to a finding of fact, coupled with a legal conclusion. The finding of fact was that the "custom in the Air Force against fraternization" had been "eroded." The *Johanns* majority found this erosion wore away the part of the Air Force custom against fraternization which prohibited sexual intercourse between officers and enlisted members where no other prohibitions, e.g., deviancy or a supervisory relationship, were present. The legal conclusion was that, to the extent the custom was eroded, it was not enforceable by criminal sanctions.

The Court of Military Appeals deferred to this Court's fact-finding powers under Article 66(c), UCMJ. 20 M.J. 155, 160-61 (C.M.A.1985). It observed, "it appears that Captain Johanns lacked the notice from custom or otherwise which, even under the relaxed standard of review established by *Parker v. Levy, supra*, is constitutionally

---

[4] *See, e.g., United States v. Parrillo*, 31 M.J. 886, 890-91 (A.F.C.M.R.1990).

necessary to meet the due-process requirements of the fifth amendment." *Id.* at 161. Acting on the finding *of fact* of the *Johanns* majority that the Air Force custom against fraternization was "eroded," the Court of Military Appeals decided Captain Johanns "lacked constitutionally required notice" of the criminality of his behavior under *Parker v. Levy* and affirmed the dismissal of the affected specifications. *Id.* at 158.

The *Johanns* majority's finding of fact, apparently because it was not expressly limited to the record in that case, has long been considered *prima facie* evidence of the general state of Air Force customs on fraternization. So long as *Johanns* announced the state of Air Force customs as a matter of fact, no prosecution outside the narrow limits outlined in that opinion could survive constitutional scrutiny. As a result, the finding set the legal framework for subsequent Air Force cases involving similar behavior.[5] Although in recent years Chief Judge Everett observed that a finding of fact contrary to the finding made in the *Johanns* decision would lead to a different legal result, no contrary finding has been made. *See United States v. Appel*, 31 M.J. at 320; *United States v. Wales*, 31 M.J. at 308-09.[6]

---

[5] For illustration of how this finding has affected Court of Military Appeals treatment of Air Force cases, *see United States v. Fox*, 34 M.J. 99 (C.M.A.1992); *United States v. Appel*, 31 M.J. 314 (C.M.A.1990); *United States v. Wales*, 31 M.J. 301 (C.M.A.1990). Its impact on Air Force decisions can be seen in these cases: *United States v. Miller*, 34 M.J. 1175 (A.F.C.M.R.1992); *United States v. Kroop*, 34 M.J. 628 (A.F.C.M.R.1992); *United States v. Cottrell*, 32 M.J. 675 (A.F.C.M.R.1991); *United States v. Arthen*, 32 M.J. 541 (A.F.C.M.R.1990); *United States v. Parrillo*, 31 M.J. 886 (A.F.C.M.R.1990); *United States v. Serino*, 24 M.J. 848 (A.F.C.M.R.1987); *United States v. Woodard*, 23 M.J. 514 (A.F.C.M.R.1986).

[6] The finding of fact made in *Johanns* cannot be undone by judicial notice at trial, since the "existence and notice" of such a custom is no longer an "undisputed fact." *Appel*, 31 M.J. at 320. What is now required is "proof at trial" of the "existence and

THE GUILTY PLEA

We now turn to the facts of this case. Lieutenant Boyett, before entering his pleas, moved to dismiss specification 5 for failure to state an offense. The trial judge determined he could not rule on the motion without hearing evidence, because there was a factual issue to be resolved: whether, because of a custom of the service or otherwise, Lieutenant Boyett "was on fair notice of the criminality of his conduct." The prosecutor suggested, since it was a bench trial, the judge could defer ruling until the presentation of evidence. Although trial defense counsel argued that the issue was solely one of law, she did not object to deferring the ruling. Pursuant to a pretrial plea agreement, Lieutenant Boyett then entered a plea of guilty to the contested specification.

During the providence inquiry, Lieutenant Boyett testified he was a product of the Air Force Reserve Officers Training Corps (ROTC) program. His ROTC instructors taught him it was improper for an officer to have a close personal relationship with enlisted members generally, not just those who work directly for the officer. After coming on active duty, he had that notion reinforced by active duty officers and NCOs. His first squadron commander held two conversations with Lieutenant Boyett on the subject of officer-enlisted relationships. The first conversation was held within two or three months after Lieutenant Boyett arrived at the squadron, after duty hours. While he described it as "just a talk," Lieutenant Boyett told the judge there was apparently "some concern" in the squadron he was "too friendly" with airmen, male and female, and the commander wanted to "redirect" him on that issue. The commander told Lieutenant Boyett close relationships between officers and enlisted members were "not looked too highly upon, and

---

notice of the custom that has been violated." *Wales*, 31 M.J. at 309. Our decision today has no effect on that aspect of the precedents of the Court of Military Appeals in Air Force fraternization cases.

that it shouldn't be done." He advised Lieutenant Boyett "serious trouble," which included court-martial, could follow. Later, Lieutenant Boyett testified, he had another after-hours conversation with his squadron commander in which the commander used the example of a female officer court-martialed for her sexual relationship with an airman who worked for her. Even though there was a duty relationship involved in the example, Lieutenant Boyett said, he understood the prohibition to apply "generally." His thoughts on the subject were reinforced in a conversation with a master sergeant in the squadron and with "other people," all of whom agreed it was improper for an officer to have "too close" a relationship with an enlisted member. Lieutenant Boyett said his understanding of the custom of the Air Force was that sexual relations between officers and enlisted members, regardless of supervision, were prohibited and could result in criminal prosecution.[7]

In concluding their colloquy concerning Lieutenant Boyett's guilty plea to this contested specification, the trial judge asked whether Lieutenant Boyett admitted the existence of "a custom in the Air Force that prohibits sexual relations between officers and enlisted people, generally?" Lieutenant Boyett said he did. Lieutenant Boyett also told the judge he understood "making that admission . . . under the reasoning [the judge] used earlier . . . would essentially undermine or undercut [his] defense counsel's motion."

---

[7] Although Air Force Regulation 35-62, Policy on Fraternization and Professional Relationships, 16 April 1990, came into effect during the period alleged in specification 5, trial counsel conceded it had not been "posted" to the base Master Reference Library until 15 October 1990. As a result, the trial judge did not discuss the implications of this policy directive with Lieutenant Boyett during the providence inquiry.

THE APPEAL

Lieutenant Boyett now renews his attack on the specification, alleging it fails because neither the pleadings nor the proof show his conduct to be prohibited by an existing "custom" of the Air Force. The behavior which forms the basis of the specification was private, consensual, nondeviate sexual intercourse between unmarried adults who happened to be officer and airman, but without a supervisory or command relationship. Therefore, citing *Johanns*, Lieutenant Boyett avers his conduct was not subject to criminal sanctions in the Air Force.

The government argues this specification does not allege fraternization, but a different Article 133 offense which should be upheld on appeal. The specification states an offense under Article 133, according to the government, because it alleges "conduct unbecoming an officer" which is "wrong" even if not ordinarily considered criminal.[8] Further, the government avers, Lieutenant Boyett's sworn responses during his guilty plea inquiry show he was on notice that his behavior was "wrong" and could lead to court-martial.

FRATERNIZATION OR NOT?

The government contends, as it did at trial, this specification does not allege fraternization. Certainly, it does not use language of the Manual for Courts-Martial, 1984, Part IV, paragraph 83f, (MCM) such as "fraternize," "on terms of military equality," or "in violation of the custom . . . that officers shall not fraternize with enlisted persons on terms of military equality." The trial judge, apparently accepting the prosecutor's argument, did not use the elements of fraternization from the MCM in his

---

[8] Fornication is not an offense in the military. *See United States v. Snyder*, 1 U.S.C.M.A. 423, 427, 4 C.M.R. 15, 19 (1952); *United States v. Johanns*, 17 M.J. at 866; *United States v. Wilson*, 32 C.M.R. 517, 518 (A.B.R.1962); *United States v. Ord*, 2 C.M.R. (A.F.) 84, 86-87 (A.F.B.R.1949).

explanation of the offense during the providence inquiry and advised both parties he considered the maximum punishment to include one year's confinement, rather than the two years prescribed for fraternization. *Compare* MCM, Part IV, paragraph 59c(2) *with* paragraph 59e; *See United States v. Arthen*, 32 M.J. at 547.

Unfortunately for the government's position, accepting the premise that the specification alleges, not fraternization, but another "unprofessional close personal relationship, including sexual intercourse," does not automatically lead to safe ground. As we have already discussed, offenses under Article 133 may not be created by the stroke of a pen in the act of signing a charge sheet because of due process, notice considerations. *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). Moreover, charging an offense under Article 133 without labeling it "fraternization," does not make proof easier. An offense may properly be charged under Article 133 even though specifically punishable under another article of the Code, but the elements of proof are the same, with the addition that the conduct be proved to be "unbecoming an officer and gentleman." MCM, Part IV, Paragraph 59c(2); *United States v. Arthen*, 32 M.J. at 544; *United States v. Parrillo*, 31 M.J. at 890.

Because Lieutenant Boyett was charged with misbehavior under Article 133, whether fraternization or not, we must determine whether he had fair notice of the criminality of his conduct.[9] For evidence of such "fair notice" we look to the trial transcript: specifically, to the stipulation of fact and Lieutenant Boyett's sworn admissions during the guilty plea inquiry.

FACTUAL BASIS FOR THE GUILTY PLEA

Lieutenant Boyett pleaded guilty and readily admitted the existence of the custom he was charged with violating.

---

[9] We note that Captain Johanns also was charged under Article 133, not Article 134. *Johanns*, 17 M.J. at 863, n. 1.

He further admitted he was on notice that his conduct in violating this custom could subject him to criminal prosecution. Is that proof of the "existence and nature" of the custom sufficient to sustain Lieutenant Boyett's conviction? We believe it is. In our legal system, one may waive even the most precious rights: a guilty plea waives the right against self-incrimination and the right to a trial of the facts. R.C.M. 910(c)(3); *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247, 253 (1969). We decline, therefore, to add to the guilty plea inquiry a requirement that the government also introduce proof of the factual basis for his plea. A trial court ought to be able to enter a finding of guilty on the basis of a provident plea alone, without receiving any evidence. Lieutenant Boyett, by his provident plea of guilty and sworn testimony before the trial judge, provided a factual basis for a finding that a custom existed which prohibited his conduct and that he was on notice that engaging in the prohibited behavior could result in criminal sanctions.

JOHANNS REVISITED?

As we noted above, the majority decision in *Johanns* made a "finding of fact and law" which, in reality, was a finding of fact coupled with a conclusion of law.[10]

---

[10] Some view the *Johanns* majority's "finding of fact and law" as a rule of law defining what fraternization is prosecutable in the Air Force. The difference to this case is that one might conclude a rule of law would still apply to Lieutenant Boyett's conduct, even though we modify the rule for future cases.

Whatever the intent of the *Johanns* majority—I am in no position to know—the Court of Military Appeals has consistently treated the *Johanns* finding as one of fact. *See Johanns*, 20 M.J. at 160, where Chief Judge Everett said:

> The court below apparently determined that no custom of that service prohibited Captain Johanns' private sexual relationships with several enlisted women. In the face of this determination by a tribunal which has factfinding powers, it must be assumed that Johanns did not receive notice from an Air Force custom

Subsequent decisions have not clearly distinguished the two parts. Today we do. We expressly limit the finding of fact by the *Johanns* majority to the state of customs reflected in the record in that case. We are not called upon to make a substitute finding of fact about the general state of Air Force customs against fraternization today, and we will not. The record of trial in this case contains a sufficient factual basis for our decision about Lieutenant Boyett's case, and his case is the only matter before us.

Lieutenant Boyett's providence inquiry responses make clear his officer pre-commissioning education and the climate of military leadership he found after entering active duty combined to impress on his mind the custom against officers "dating" and engaging in sexual intercourse with enlisted persons, regardless of the existence of a supervisory relationship. Lieutenant Boyett's responses are sufficient to show that, at the time of his offense, he was on notice of the existence of Air Force customs which proscribed the behavior charged in specification 5. On the basis of the record before us, we find "there is a

---

or long-established practice that his amorous activities might transgress Articles 133 and 134.

See also Appel, 31 M.J. at 320; *Wales*, 31 M.J. at 308-09. That the *Johanns* majority's finding was primarily fact is evident from the extended discussion on the state of customs in the Air Force which preceded it. Having found an "eroded" custom which did not extend to "mutually voluntary, private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision," the majority "found," quite logically, that Captain Johanns's behavior, since it was not proscribed by such a custom, could not be prosecuted criminally. This latter "finding" was a conclusion of law, whether based on notions of due process and lack of notice or on the principle that a custom "ceases to exist when its observance has been long abandoned." MCM, 1969 (Rev.), paragraph 213b. But it was a legal conclusion completely dependent on the underlying findings of fact, and can have no independent life apart from those findings. Of course, had the *Johanns* majority intended to craft a rule of law, there are sigificant questions about their legislative authority.

factual basis for the plea" to specification 5, and we find Lieutenant Boyett's guilty plea to that specification provident. R.C.M. 910(e).

Before we conclude this discussion of Lieutenant Boyett's guilty plea, we must address the "finding of . . . law" contained in the *Johanns* majority's decision. We have shown above that the combined finding of "fact and law" was actually a finding of fact and a legal conclusion, and we have limited the factual finding of *Johanns* concerning the state of Air Force customs against fraternization to that case. It follows, then, that the "finding of law" in *Johanns* is not binding on a different, later set of facts concerning the custom against fraternization. We are free to uphold Lieutenant Boyett's guilty plea if it is provident, and we have found it provident. Our ruling on the providence of Lieutenant Boyett's guilty plea does not commit us to a finding concerning the general contours of Air Force customs concerning fraternization. We leave to future cases such matters of adjudicative fact.

OTHER ISSUES

We noted above the trial judge did not advise Lieutenant Boyett of all the elements of this Article 133 offense. He advised him there were two elements of specification 5:

> The first is that on divers occasions, and by divers, the government is alleging a number of times, an indefinite number, but certainly more than one, between the dates of about 15 May 1990 and 30 June 1990, you engaged in unprofessional close personal social relationships, including sexual intercourse, with Airman [B], an enlisted person.
>
> And the second element would be that under the circumstances your conduct was unbecoming an officer and a gentleman.

The trail judge omitted advice to Lieutenant Boyett that an element of the offense was that this "close personal

social relationship, including sexual intercourse," violated a custom of the Air Force. *United States v. Fox*, 34 M.J. at 103; *United States v. Wales*, 31 M.J. at 309. Nevertheless, we find this omission not fatal in light of the discussion which ensued between the judge and Lieutenant Boyett. In a colloquy which covered more than seven pages of transcript, the judge carefully defined what it meant for Lieutenant Boyett to plead guilty to conduct unbecoming an officer and a gentleman as alleged in specification 5. Both in the stipulation of fact, Prosecution Exhibit 1, and personally, Lieutenant Boyett told the judge why he believed a custom of the Air Force existed which prohibited the type of social relationship in which he engaged with Airman B. Lieutenant Boyett concluded by telling the judge he admitted "there is a custom in the Air Force that prohibits sexual relations between officers and enlisted people, generally." We find Lieutenant Boyett was clearly on notice that the existence of a custom of the Air Force which prohibited his conduct was an essential element of proof of specification 5. Knowing that, we find he knowingly and consciously gave up his right to a trial of the facts concerning specification 5. *Cf., United States v. Care*, 40 C.M.R. at 253.

Lieutenant Boyett also has asserted the staff judge advocate erred by denying a defense request for delay in submitting clemency matters. A defense request for an additional 10 days to submit matters pursuant to R.C.M. 1105, dated 30 May 1991, was denied by letter dated 30 May 1991. A request for reconsideration, dated 3 June 1991, was denied by letter dated 3 June 1991. Both letters of denial, although signed by the staff judge advocate, used the authority line, "FOR THE COMMANDER." Lieutenant Boyett points out R.C.M. 1105 (c)(1) says the convening authority must act personally on requests for delay in submission of matters, and asserts there is no indication the convening authority ever saw the request or acted on it personally.

This assertion need not detain us long. The "authority line" is used in Air Force correspondence when a staff officer is permitted to sign *for* a commander. Air Force Regulation 10-1, Preparing Written Communications, paragraph 3-4, 29 March 1985; *cf., United States v. O'Connor,* 19 M.J. 673, 675 (A.F.C.M.R.1984). Use of the authority line does not signify the staff officer who signed "for the commander" usurped the commander's decision authority. *United States v. Meckler,* 6 M.J. 779, 781 (A.C.M.R.1978). In the absence of some evidence to the contrary, we will not assume that a usurpation occurred in this case.[11] *United States v. Moschella,* 20 U.S.C.M.A. 543, 43 C.M.R. 383, 386 (1971); *United States v. Masusock,* 1 U.S.C.M.A. 32, 1 C.M.R. 32 (1951).

CONCLUSION

On the basis of the entire record, the approved findings of guilty and sentence are hereby

AFFIRMED.

---

[11] Lieutenant Boyett submitted a letter from his defense counsel, a personal letter, and 29 additional letters on 3 June 1991, which were considered by the convening authority prior to his action. In light of all the matters the convening authority had before him, we do not believe the one letter submitted after his action could have significantly impacted the decision.

Senior Judge SNYDER and Judges GRUNICK and JOHNSON concur.

JAMES, Judge (concurring):

I agree with the disposition reached by my Brother Heimburg and with most of his reasoning. I agree with his view that we could not possibly have declared 10 years ago in *Johanns* what the state of facts would be in the cases which followed afterwards. I also agree with his view that the progeny of *Johanns* all descend from our opinion in that case, directly from our finding of fact, and that the conclusions of law reached by the Court of Military Appeals were made inevitable by our findings of fact. I write because I believe the lead opinion is too gentle. *Johanns* was wrong as a matter of fact, showed a confused understanding of the custom, was reached by faulty logic, and exceeded our authority. I would overrule it.

The *Johanns* proposition that there existed no such custom as a matter of law was unsupported by the opinion and refuted by the dissents of Chief Judge Hodgson and, in a different way, Judge Miller, and now by Lieutenant Boyett. I had no doubt then, and I have no doubt now, that, as a matter of *fact*, there existed then, now, and at the time of Lieutenant Boyett's trial a general custom of the Air Force that forbids its officers to associate casually with enlisted members (regardless of command and "supervisory" relationships) in social, romantic, and sexual settings.[12]

---

[12] The following published opinions of The Judge Advocate General suggest the vitality in the Air Force of the general custom against fraternization: OpJAGAF 1987/89, 3 Civil Law Op. 632 (lieutenant found unqualified for promotion because of unprofessional relationship with airman whom he married); OpJAGAF 1986/156, 3 Civil Law Op. 515 (lieutenant found unqualified for promotion because she fraternized with airman, among other reasons); OpJAGAF 1986/95, 3 Civil Law Op. 422 (same); OpJAGAF 1985/24, 3 Civil Law Op. 125 (officer involuntarily separated from

Such a drastic mistake needs an explanation. The majority in *Johanns* confused fraternization with caste and policy requirements with customs. That led it to mistaken analysis of the crucial factual issue and presumably to its faulty legal conclusion, too.

I. Caste versus Custom

The *Johanns* majority conceded that there was such a custom before World War II and that there remained such a custom after the war, though perhaps modified. It then looked to "erosions" of the distinctions expressed in regulations about housing, messing, and the acknowledgement of marriages between officers and enlisted members and concluded that the custom about fraternization must have gone away with the caste distinctions that such social separations once suggested. *Johanns*, 17 M.J. at 865-67. Fraternization might once have involved caste, but those days are gone. It does not follow that all of the custom dealing with fraternization passed away, too.

It is a sidelight of *Johanns* that the majority paused to note the frequency with which fraternization cases have involved "some aberrant conduct." *Johanns*, 17 M.J. at 866-67. From that probably accurate sampling of the

---

service because of fraternization with enlisted husband of enlisted wife whom officer supervised); OpJAGAF 1985/13, 3 Civil Law Op. 104 (officer involuntarily separated because of fraternization); OpJAGAF 1983/35, 2 Civil Law Op. 559 (same; "There is a custom. . . .").

It is emphatically *not* the point here that The Judge Advocate General holds the opinions reported, for the general existence of the custom is simply not susceptible to adjudication by lawyers on appellate review, as if a custom might be established by legal precedent. However, the advice given in the cited opinions, though sometimes deferential to the authority of this Court in its own jurisdiction, contrasts with the position taken in *Johanns*. *See also* OpJAGAF 1985/60, 3 Civil Law.Op. 178 (discussing effect of *Johanns* on adverse personnel action); OpJAGAF 1971/69, 1 Civil Law Op. 189 ("There is a custom. . . .").

appellate data the majority mistakenly reasoned that because "officer-enlisted marriages are currently authorized," [13] the non-aberrant courtship behavior that precedes marriages could not be prosecuted as a violation of the custom. The leap was too big. The outline of the custom is not established by reported appellate decisions, for they describe only episodes in which some criminal response is warranted, episodes which one would expect to involve extreme deviation. To say that the marriage is lawful and must be recognized does not imply that the community that establishes customs has changed its view about either the wisdom of such a marriage or the acceptability of the courtship that precedes it. Indeed, the relative rarity of such marriages—even today—is some evidence that the community which establishes customs has not changed its mind. Even today, 10 years after *Johanns*, one rarely encounters officers-enlisted romance that is not furtive.

There remains a custom against fraternization. Chief Judge Hodgson and Judges Snyder and Miller explained how and why in *Johanns*. 17 M.J. at 870, 871, 886-87. It remains because the community or soldiers and airmen recognizes that social relationships between a military superior and a military subordinate create perceptions of favoritism and familiarity that detract from the authority of officers to command unquestioning, undelayed obedience, even to orders that may result in inconvenience, hardship, or death. Fraternization remains an issue because it bears on leadership, discipline, and command. We are a community mainly of good soldiers who do not conduct themselves such that leadership, discipline, and command are impaired. Our views of our service are reflected in our views on what is and is not acceptable behavior. The *Johanns* majority, however, looked simplis-

---

[13] As if they might be forbidden. I am dubious of any suggestion that the military services had any legal choice other than to "authorize" officer enlisted marriages.

tically to erosion of caste distinctions and diagnosed the end of the custom prematurely, after only a superficial examination.

II. Regulations and Customs

It is not relevant that, then or now, regulations dilute caste distinctions between officers and enlisted members. An officer can live next door to an enlisted family and yet still insist that the enlisted servicemember show good subordination and still forbid "Dick" and "Tom" conversations over the boundary fence. Officers and enlisted members can assemble at the same restaurants or social and athletic events—even combative sports—and yet the officer can and must insist before, during, and after on good subordination. The officer's superiors are perfectly correct to insist that the officer shall not permit himself to be so overcome by competitive zeal or to so lubricate his inhibitions as to behave as anything less than an officer. Caste is not the point. Leadership, discipline, and command are the points.

It is not relevant that certain of the technical functional "communities" of the Air Force changed their policies in ways that reduced the separation between officers and enlisted members. To be an officer requires one to be capable of correct behavior without that external support. I have no doubt that such social and residential circumstances as are now the norm expose all of us to easy opportunities to err, for the demand on the officer becomes more exacting as the setting resembles more closely a social setting in civilian life. But the fact that one is less helped and more vulnerable to breaches of the custom does not prove that the custom has died. The custom remains, even though it has become more difficult to meet its standard of behavior. The same might be said of drug abuse: Though the opportunity to abuse illegal drugs seems to be everywhere, the social and legal standards remain unchanged. The standards have not died just because "everyone is doing it."

The *Johanns* majority also confused the declarations of policies from the Air Staff with the disestablishment of the custom. Customs arise from common usage. *See generally*, Manual For Courts-Martial, United States, 1984, Part V, paragraph 60c(2)(b). They may not be created by declaration from on high.[14] Conversely, a custom might be stamped out by policy declarations. Thus, a conviction for disrespect by omitting to salute would not lie if the Secretary decreed through a regulation that saluting was forbidden. However, the policy positions cited by the *Johanns* majority did not purport to put officers and enlisted members on socially equal footings. They simply eliminated some vestiges of a distant past's caste system. The one does not necessarily doom the other.

---

[14] Of course, a command from on high, stated in a regulation, becomes equally enforceable under Article 92, UCMJ, 10 U.S.C. § 892 (1988), and it has the advantage of certainty and convenience in proof. The oft-repeated suggestion that the Air Force would do well to proclaim its view in a regulation may be correct, and the Air Force has done so. *See* Air Force Regulation 35-62, "Policy on Fraternization and Professional Relationships" (16 April 1990), and AFR 30-1, "Air Force Standards of Conduct," para. 7 (4 May 1983). One of those regulations, AFR 30-1, declares itself to be nonpunitive (though perhaps evidence of our customs), and the other seems not to have been intended to be punitive, though we do not decide that today.

Regulations, however, are now and have always been legally irrelevant when the prosecution is not for disobedience under Article 92 but is instead for "conduct unbecoming" under Article 133 or the parallel conduct under Article 134. In the latter cases, the policy proclamations of the headquarters are not offended, but the commonly held views of the responsible members of the community may be, and those views may supply the needed notice in the form of customs. Regulations are simply red herrings in cases like *Johanns* and this case, in which the pleadings allege violations of Articles 133 or 134. The fact that there may be a better or easier way to deal with the problematical conduct does not mean that a conviction gotten the hard way is illegal.

II. Judicial Excess

Those, however, are not the only reasons, or even the principal reasons why I would overrule *Johanns*. I would do that because this Court had no business attempting to decree in such general terms the presence or absence of customs in the Air Force. Its duties required only that it determine whether it was necessary (or perhaps how it was necessary) to prove the existence of such a custom as that officer was accused of having violated and then to test that record to determine whether the proof requirement in that case had been met.

We are judges, not the keepers of the Air Force's history or the arbiters of its traditions. Four judges of this Court declared the custom dead after a poll of the expressions of some "functional area" decisionmakers and then purported to declare the collective view of thousands as to what the thousands had established by their behavior. While political and sociological pollsters might be able to do it, we are in a poor position to take polls, and we did a poor job. When military appellate judges do so much more than they need and more than they should, they risk great and needless damage to institutions of unique importance to the nation's security.

Confused about its role, the *Johanns* majority held, as a matter of law, that the custom was "so eroded as to make *criminal* prosecution . . . unavailable." (Emphasis in original.) That exaggerates the role of this Court. If a custom is found to exist, that ends the inquiry. If the custom exists at all, then notice is given, due process is satisfied, and a conviction may be sustained under Article 133 or 134.[15] This Court had no legal need to discrimi-

---

[15] Neither is it significant that, according to the *Johanns* majority, enforcement of the custom lapsed during World War II and that fraternization of that era did not affect discipline. The question before the Court in 1983 was whether there existed such a custom, not its enforcement history and not the effects of conduct that deviated from the customary.

nate between customs that can be enforced under Articles 133 and 134 and those which can be enforced administratively, but it clearly did. *Johanns*, 17 M.J. at 869 n. 21. Volunteering to rank customs in that way, this Court inspected the custom unnecessarily for "erosion" and clearly concluded that enough was left to satisfy administrative needs, *id.*, and in my view that is enough—*any* is enough—to satisfy all needs. Thus, the conclusion of law in *Johanns* was based on the same sort of imprecise analysis that led to its conclusion of fact, and it is equally defective.

These flaws so infected the decision in *Johanns* that it would be not excess to overrule it explicitly and finally, and I would.

DIXON, Chief Judge, joined by Senior Judges O'HAIR, LEONARD, and McLAUTHLIN (concurring in part and dissenting in part):

I concur in the majority disposition of this case except for the affirmance of specification 5 of the Charge. In my view, the trial judge erred by denying the defense motion to dismiss this specification as a matter of law. I believe existing legal precedent requires this Court to find appellant's plea of guilty to specification 5 improvident.[16] I would dismiss specification 5 and affirm the sentence as adjudged.[17]

---

[16] In *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990), Chief Judge Everett writing the lead opinion stated:

> Likewise, we conclude that, if the Air Force elects to prosecute and punish private sexual intercourse between an officer and an enlisted person not under his command or supervision, then . . . it must promulgate specific punitive regulations forbidding the unwanted conduct.

[17] A dismissal of specification 5 would not necessitate a rehearing on the sentence since the trial judge entered the following statement on page 82 of the record of trial: "With respect to specification 5, that specification played no part in my determination of an appropriate sentence. I would have imposed the same sentence even without that specification."

Given the statutory mandate of Article 66, UCMJ, this Court can affirm only those findings that we find are correct in both fact and law. In exercising that responsibility, we are obliged to determine what the law was *at the time of trial* and to fairly and consistently apply it to the case before us. With respect to the conduct alleged in specification 5, I have no difficulty ascertaining what the state of the law was within the Air Force when appellant was tried.[18] Finding the law clear and unambiguous, I cannot find appellant's conviction on specification 5 correct in law.[19]

This Court in *United States v. Johanns,* 17 M.J. 862 (A.F.C.M.R.1983) held that "as a matter of fact and law the custom in the Air Force against fraternization has been so eroded as to make *criminal prosecution* against an officer for engaging in mutually voluntary private, non-deviate sexual intercourse with an enlisted member, neither under his command nor supervision, unavailable." I can point to no holding by this Court which has been more widely discussed or controversial. Yet, for the past 10 years this holding has precluded the criminal disposition of cases involving the type of conduct alleged in specifica-

---

[18] As Judge Rives observed in *United States v. Parrillo,* 31 M.J. 886, 889 (A.F.C.M.R.1990); "There was a time—not so long ago—when the criminality of Parillo's conduct with subordinate enlisted personnel would not be seriously questioned. However, this has not been true since the celebrated case of *United States v. Johanns.*" Continuing he wrote: "The appellate courts in *Johanns* held that an unmarried Air Force captain was guilty of neither conduct unbecoming an officer (Article 133, UCMJ), nor conduct prejudicial to good order and discipline or of a nature to discredit the armed forces (Article 134, UCMJ) when he engaged in 'mutually voluntary, private, non-deviate sexual intercourse, with an enlisted member, neither under his command nor supervision'."

[19] I note that appellant did not flaunt his relationships with the enlisted member named in specification 5. The record establishes that the two individuals never went anywhere in public together. She visited appellant at his off-base residence approximately 12 times where they engaged in sexual intercourse on several occasions.

tion 5. The very essence of judicial precedents is to ensure that like cases will be treated the same. Accordingly, I can find no persuasive rationale for permitting appellant's conviction on this specification to stand.

I cannot subscribe to the majority's retroactive, re-interpretation of the *Johanns* holding, limiting it solely to the facts of that case. As the majority correctly observes, the *Johanns* holding has influenced a decade of Air Force cases. It has done so because this Court found *as a matter of law* that conduct like that described in specification 5 could not be the basis of criminal prosecution in the Air Force.[20] Just as *Johanns* has dictated the outcome in a number of subsequent cases, it should also be the controlling factor in this case.[21] Regardless of how this Court may choose to apply its current view of the law pertaining to sexual intercourse between officers and enlisted personnel in the future, I believe we are duty bound to recognize

---

[20] Whether or not a custom exists is a question of fact. However, I submit whether or not a custom can be the basis for criminal prosecution is a matter of law.

[21] I cannot distinguish this case from *United States v. Cottrell*, 32 M.J. 675 (A.F.C.M.R.1991). In *Cottrell*, our Court found a plea of guilty to a fraternization specification improvident and set aside the conviction. The accused in that case admitted the existence of, and his awareness of the Air Force custom against fraternization. He also told the military judge he knew the relationship was wrong. However, the specification fell because proof was lacking of any supervisory relationship. In *United States v. Appel*, 31 M.J. 314 (C.M.A.1990), the U.S. Court of Military Appeals reversed our affirmance (the accused having pled guilty) of one specification of fraternization. The decision rests on the absence of a command or supervisory relationship during the period alleged. In light of these cases, it is not the findings of fact that this Court reached in *Johanns* that deters me from voting with the majority in this case. Rather it is the legal conclusion reached in *Johanns* that a command or supervisory relationship is necessary in order "to make criminal prosecution" available. Following the legal precedents of *Johanns*. *Appel* and *Cottrell*, I must vote to overturn appellant's conviction on the one specification.

that *Johanns* was the controlling precedent 2 years ago when this case was tried.

I am perplexed by the majority's use of the guilty plea inquiry to uphold appellant's conviction of specification 5.[22] I readily agree that a plea of guilty is the strongest proof known to law. However, we are not dealing here with factual proof concerning the conduct in question. Instead, we are dealing with the question of whether appellant can be criminally prosecuted even if the conduct alleged is true. Whether or not a military member can be prosecuted for a particular type of conduct is, in my view, clearly a question of law. An accused cannot make conduct, which is otherwise not subject to criminal sanction, a crime merely by entering a plea of guilty. *United States v. Arthen*, 32 M.J. 541, 544 (A.F.C.M.R.1990); *United States v. Lumagui*, 31 M.J. 789, 790 (A.F.C.M.R. 1990). While a plea of guilty may dispense with the requirement to prove particular conduct, it cannot create a crime.

---

[22] Appellant's plea of guilty to specification 5 did not waive his claim that the specification failed to state an offense. R.C.M. 905(e), 907(b). I think it reasonable to surmise that appellant proceeded with a plea of guilty, despite his legal objection, in order to preserve the sentence protection afforded by the pretrial agreement.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 399080 24025